TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,927)

(35,927)

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. 1940. Civil

CHRISTOPHER BARBOUR COLLINSON, EDGAR PERCY LEWIS, and Richard F. Cooper, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, Plaintiffs,

vs.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant

PETITION—Filed Sept. 20, 1929

The plaintiffs allege the following facts:

(1) During the taxable period from January 1st to December 12th, 1920, inclusive, N. E. Corthell, was the qualified and acting administrator of the estate of Arthur Francis Thomas Cooper, deceased, appointed by the District Court for the County of Albany, State of Wyoming.

(2) Thereafter, to-wit, on February 18th, 1921, said administrator made return to the Commissioner of Internal Revenue, showing gross and net income received on account of said estate, during the said taxable period. The net income shown on said return was Sixty-one Thousand One Hundred Seventy and 84/100 ($61,170.84) Dollars, and the indicated tax thereon was Thirteen Thousand Eighty-two and 61/100 ($13,082.61) Dollars.

(3) At the close of the said taxable period, said adminis-
[fol. 2] trator made final settlement of his account, which were approved by said court, and a decree of distribution of said estate was made, under which the said estate was distributed to the plaintiffs, as trustees, under the Will of said Cooper, and the said administrator was discharged and the said estate closed.

(4) Thereafter, to-wit, on March 14, 1921, the plaintiffs paid to the Collector of Internal Revenue, at Cheyenne, Wyoming, the said sum of Thirteen Thousand Eighty-two and 61/100 ($13,082.61) Dollars in full settlement of the said tax.

(5) During the said taxable period, the administrator in the progress of said administration paid out and expended certain sums of money, among which were the following, to-wit:

Cost of Publishing Notices (incident to final set-ment)	$67.52
Probate fees (on final settlement)	26.00
Administrator's bond premium (Aug. 4 to Dec. 12, 1920	105.55
State of Wyoming Inheritance Tax upon said estate	16,870.00
	$17,069.07

The administrator, on said return, claimed and took sundry deductions from gross income, including the items of disbursement aforesaid. The administrator further for the purposes of the normal tax, deducted from the net income on said return, a specific credit of One Thousand ($1,000.00) Dollars. The administrator further computed and paid normal tax on the first Four Thousand ($4,000.00) Dollars of net income shown on said return, at the rate of four (4%) per cent and on the balance of net income at the rate of eight (8%) per cent.

(6) On November 24th, 1925, the Commissioner of Internal Revenue assessed and determined the income tax upon said return. In such determination, the Commissioner disallowed the deductions for disbursements claimed as aforesaid, disallowed the specific credit so claimed, and computed [fol. 3] the tax on the first Four Thousand ($4000.00) Dollars of net income at eight (8%) per cent, instead of four (4%) per cent; and thereupon determined and assessed a deficiency income tax upon said return of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars.

(7) Thereafter, to-wit, on March 21, 1926, the defendant notified the administrator of such assessment and de-

manded payment of the same; whereupon, the plaintiffs, under duress and compulsion and protest, paid to the defendant the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, in discharge of said deficiency tax.

(8) The plaintiffs allege that the disallowance of said deductions was unauthorized and unlawful; that the administrator was entitled to claim and take the same in determining the net income of said estate; and that the deficiency tax determined and assessed against said estate, based on the disallowance of such deductions, was unauthorized and unlawful. The plaintiffs, therefor-, allege that, to-wit, on March 21, 1926, the defendant in manner aforesaid, became and was indebted to the plaintiffs for moneys then had and received by the defendant from the plaintiffs to the use of the plaintiffs in the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16), which said sum was then and there due and payable from the defendant to the plaintiffs; and that no part of said indebtedness has been paid.

(9) On July 27, 1926, plaintiffs made application to the defendant, and the Commissioner of Internal Revenue, for the refund of the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, and demanded payment thereof; and thereafter, to-wit, on September 4, 1929, such application and demand were refused.

Wherefore the plaintiffs pray judgment against the defendant for the recovery of the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, together with interest thereon at the rate of six (6%) per cent per annum, from March 21, 1926, and for costs and all other proper relief.

Corthell, McCullough & Corthell, Plaintiffs' Attorneys.

[fol. 4] *Duly sworn to by N. E. Corthell. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Feb. 5, 1930

For answer to the petition herein, defendant says:

(1) Defendant admits the allegations of paragraph one of the petition.

(2) Defendant admits the allegations of paragraph two of the petition.

(3) Defendant is without knowledge as to the facts set forth in paragraph three of the petition and demands strict proof of each and every allegation thereof.

(4) Defendant admits that the sum set forth in paragraph four of the petition was paid on or about the date alleged but denies that said payment was in full settlement of said tax.

(5) Defendant denies the allegations of paragraph five of the petition.

(6) Defendant admits that an additional assessment of $7,297.16 was made by the Commissioner of Internal Revenue on or about the date alleged but denies the basis alleged by plaintiffs for said additional assessment.

(7) Defendant admits the payment of the sum alleged in paragraph seven of the petition on or about the date alleged but denies that the payment was made in the manner alleged in said paragraph.

(8) Defendant denies each and every of the allegations of paragraph eight of the petition.

[fol. 5] (9) Defendant denies the allegations of paragraph nine of the petition.

Wherefore defendant demands judgment that the petition be dismissed and for costs herein.

Albert D. Walton, U. S. Attorney and Attorney for Defendant.

evp.

UNITED STATES OF AMERICA,
District of Wyoming, ss:

Albert D. Walton, being first duly sworn, upon his oath deposes and says that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above entitled cause; that he has read the above and foregoing answer and knows the contents therein contained and that all of the facts therein stated and allegations therein contained are true as he verily believes.

Albert D. Walton.

Subscribed in my presence and sworn to before me this 5th day of February, A. D. 1930. Capitola G. Allison, Deputy Clerk, U. S. District Court, District of Wyoming.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUGGESTING DEATH OF CHRISTOPHER BARBOUR COLLINSON AND DIRECTING THAT THE ACTION PROCEED—Filed Aug. 29, 1930

It appearing to the court, upon the suggestion of Edgar Percy Lewis and Richard F. Cooper, as surviving trustees under the Will of Arthur Francis Thomas Cooper, Deceased, that on June 5th, 1930, Christopher Barbour Collinson, one of the original trustees, departed this life; and

It further appearing to the court from such suggestion that all rights and powers of said Chritopher Barbour Collinson survived and passed to the surviving trustees aforesaid;

It is, therefore, ordered that this action proceed as the action of Edgar Percy Lewis and Richard F. Cooper, as trustees under the Will of Arthur Francis Thomas Cooper, [fol. 6] Deceased, Plaintiffs, against the defendant Marshall S. Reynolds, Individually, and as Collector of Internal Revenue.

Dated this 29th day of Aug., 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR STATEMENT AND DECLARATION OF CONCLUSION OF LAW—Filed Aug. 29, 1930

This Cause coming on to be heard before the court this day, upon the motion of the plaintiffs for a statement and declaration of conclusion of law, the plaintiffs appearing by N. E. Corthell, their attorney, and the defendant appearing by Albert D. Walton, his attorney, and the court having heard the argument of counsel and being fully advised:

It is ordered that the said motion be denied, to which order and ruling of the court the plaintiffs except.

Done in open court this 29 day of August, 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed Aug. 29, 1930

This action came on regulary to be tried before the Court without a jury, due waiver of a jury in writing having been filed herein, and the parties appearing by their respective counsel, and the Court having heard and considered the evidence and argument of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. That Arthur Francis Thomas Cooper died on or about December 8, 1918, and N. E. Corthell was appointed and duly qualified and acted as administrator of the estate of the decedent. That on or about February 8, 1921, the said administrator on behalf of said estate filed with the Commissioner of Internal Revenue a federal income tax return for the said estate for the taxable period starting January [fol. 7] 1st, and ending December 12, 1920. That final settlement of the said estate was made on December 12, 1920, and at that time the said estate was distributed to the trus-

tees under the Will of the said decedent and the administrator discharged and the estate closed.

II. That the trustees under the Will of Arthur Francis Thomas Cooper, deceased, to whom such distribution was made were Christopher Barbour Collinson, Edgar Percy Lewis, and Richard F. Cooper, the plaintiffs herein.

III. That Marshall S. Reynolds is the United States Collector of Internal Revenue for the District of Wyoming and the tax here in controversy was paid to him as such official.

IV. That the income tax return for the said estate filed as hereinabove set out showed a tax liability of $13,082.61, which sum was paid. In determining this tax, deductions from gross income of the estate for attorney's fees, in the sum of $20,750.00 and for Wyoming inheritance tax in the sum of $16,870.00, which sums had been paid by the administrator, were claimed.

V. In March, 1923, an Internal Revenue Agent, after an investigation of the said estate, recommended the disallowance of both of these claimed deductions. In August, 1925, the Commissioner notified the taxpayer of the deficiency in tax amounting to $17,601.15, based upon the report of the said Revenue Agent, following which the taxpayer filed a protest. Upon consideration of the matter as presented by the protest, and in November, 1925, the said Commissioner made a redetermination of the tax and found that the greater portion of the deduction of $20,750.00 represented a business expense of the estate, and allowed that sum as a deduction, but adhered to his disallowance for the Wyoming State Inheritance Tax in the sum of $16,870,00, holding that such payment, although made by the administrator, was deductible only by the beneficiaries of the estate, and determined the additional tax liability on this basis to be $7,297.16, which amount was paid by the plaintiffs on March 20, 1926. On July 29, 1926, the taxpayer filed a claim for refund of such additional tax.

VI. On May 18, 1929, the Commissioner of Internal Reve-
[fol. 8] nue rejected the claim for refund filed on July 29, 1926, as above set out, and so notified the representatives of the estate, and at the same time further advised the administrator of the estate that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduc-

tion from gross income for the year 1920 in accordance with Section 703 of the Revenue Act of 1928, that the personal exemption of $1,000.00 was also allowed and that the normal tax on the first $4,000.00 of taxable income was computed at 4% instead of at 8%; that the attorney's fees in the sum of $20,750.00 which had been claimed as a deduction in the return was disallowed, that the correct computation of the tax resulting from the foregoing adjustments resulted in an increase in the additional tax, that is, in excess of the sum of $7,297.16, in the amount of $1,567.19, but that the collection of this excess was barred by the statute of limitations and no attempt to collect it was made.

VII. Thereafter this suit was filed by the trustees. The other small items included in the protest of payment were waived upon the trial and the matter was presented to the Court solely upon the action of the Commissioner as it affects and concerns the claimed deductions for attorney's fees and Wyoming inheritance tax.

Conclusions of Law

I. The income tax collected by the defendant from the estate of Arthur Francis Thomas Cooper, deceased, for the year 1920 is correct and in accordance with law.

II. The defendant is entitled to judgment for his costs and disbursements herein.

To each of which Conclusions of Law the plaintiffs except.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

In United States District Court

Judgment—Filed Aug. 29, 1930

And now, based on the Findings of Fact and Conclusions of Law heretofore made and entered herein, it is ordered and adjudged that the defendant have and recover judgment [fol. 9] against the plaintiffs herein for his costs and disbursements herein, to be taxed.

To which judgment the plaintiffs except.
Dated this 29th day of August, A. D. 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Aug. 29, 1930

CAPTION

Be it remembered that on the 27th day of May, 1930, at ten o'clock A. M. of said day, the above entitled matter came on for final hearing before the court, N. E. Corthell, Esquire, appearing as attorney for the plaintiff, and Honorable Albert D. Walton, United States Attorney for the District of Wyoming, and Honorable John R. Wheeler, appearing on behalf of the defendant. After opening statements by counsel the following proceedings were had:

By Mr. Corthell: Paragraphs 1, 2, and 3 of the petition are admitted. Paragraph 4 of the petition is admitted except the statement at the end that payment was in full of tax. Paragraph 5 is admitted that during the taxable period in 1920 covered by this return the administrator in the progress of said administration paid out among other sums $16,870.00 to the State of Wyoming as inheritance tax on the transmission of said estate. It is also admitted that the administrator in said return claimed and took a deduction including the disbursement of $16,870.00. It is also admitted that the administrator for the purpose of the normal tax deducted from net income a special credit of $1,000.00. It is admitted that the administrator further on said return computed and paid the normal tax on the first $4,000.00 of the net income at the rate of 4 per cent and on the balance of net income at the rate of 8 per cent.

OFFERS IN EVIDENCE

We now offer in evidence as Exhibit No. 1 copy of a letter dated August 5, 1925, from the Deputy Commissioner addressed to the Estate of A. F. T. Cooper, Laramie, Wyoming.

We now offer in evidence as Exhibit No. 2 a copy of [fol. 10] protest dated August 27, 1925, and referring to the notice of August 5, 1925,

We offer in evidence as Exhibit No. 3 Commissioner's letter dated November 24, 1925.

We offer in evidence as Exhibit No. 4, a copy of the letter dated March 20, 1926, addressed to Marshall S. Reynolds, Collector of Internal Revenue.

We offer in evidence as Exhibit No. 5, copy of a letter dated July 27, 1926, and addressed to M. S. Reynolds, Collector of Internal Revenue.

We offer in evidence as Exhibit No. 6, photostatic copy of application for refund.

We offer in evidence as Exhibit No. 7 photostatic copy of brief in support of claim.

Mr. Wheeler: I object to the introduction of the brief on the ground that it is purely argumentative.

By the Court: The objection is overruled.

By Mr. Corthell: We now offer in evidence as Exhibit No. 8 photostatic copy of a letter from the Commissioner dated May 18, 1929.

We offer in evidence as Exhibit No. 9 photostatic copy of a letter from the Commissioner dated September 4, 1929.

We also offer in evidence as Exhibit No. 10 photostatic copy of the original return of the taxpayer.

As to paragraph 7 of the petition it is admitted that the deficiency tax of $7,297.16 was on March 23, 1926, paid by the plaintiff to the defendant under protest.

Motion to Dismiss

By Mr. Wheeler: The evidence as introduced by the plaintiff also shows the Government's case. I desire at this time to move for judgment of dismissal of the plaintiffs' case upon the evidence submitted.

By the Court: Overruled.

[fol. 11] **Exhibit 1**

Exhibit No. 1 is a form letter from the Deputy Commissioner of Internal Revenue, addressed to Estate of A. F. T. Cooper, reading:

"An audit of your income tax return filed for the taxable year 1920, disclosed a deficiency in tax amounting to $17,601.15. This deficiency is the result of certain adjustments which are shown in the attached statement."

The letter allows thirty (30) days to present a protest and details the procedure prescribed. The following statement is attached.

"Statement

IT:PA:4. GWF:406

In re Estate of A. F. T. Cooper, Laramie, Wyoming

Year, 1920; Deficiency in Tax, $17,601.15

The adjustment recommended by the examining officer in his report dated March 19, 1923, have been approved as submitted.

Due consideration has been given your protest of April 5, 1923, but no change has been made in the audit as recommended by the examining officer.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

In the event that you do not acquiesce in this determination of your tax lability, any protest submitted must be signed and sworn to by you.

Payment of the tax in question should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him."

There is also attached a report of the Revenue Agent in Charge, dated March 19, 1923, relating to the years 1919 and 1920, indicating no change in the assessment except an additional tax of $17,601.15 for 1920, which is recommended as the result of an investigation.

[fol. 12] Also attached is the report of A. L. Maple, examining officer, recommending as the principal changes, "Wyoming Inheritance tax disallowed. Attorney's fees for estate disallowed." This report deals in some detail with the history of the estate, the nature of the property, and

the method of determining depletion charges on oil properties which are found to be substantially correct. A statement of the "Block Adjustments" for the taxable year 1919 is appended indicating no change; also, the following statement of "Block Adjustment" for 1920:

Schedule 3. Block Adjustment. 12/31/1920

Block	Per original	Additions to income	Deductions from income	Amended
E	59,560.20	37,819.07	.....	97,379.27
G	1,353.21	.....	.....	1,353.21
J	257.43	.....	.....	257.43
L	61,170.84	.....	.....	98,989.91

Schedule 3-A, Explanation of Items

Block E

Analysis of Net Amount in this Block per Original

Gross income from royalties		293,282.61
Less:		
Depletion	81,710.53	
Expenses of Trustees	3,730.02	
Geological investigations and supplies, tools	869.00	
Administration Expenses:		
Publishing notices	67.52	
Probate fees	26.00	
Admr. bond premium	105.55	
Attorney's fees	20,750.00	
Taxes:		
State and County	201.04	
Production tax	340.51	
U. S. Federal Estate Tax	109,047.24	
Wyoming Inheritance Tax	16,870.00	
Clerical Services	5.00	
		233,722.41
Net amount per original return		59,560.20

[fol. 13] Items Disallowed in Amended Administration Expenses

1. Publishing notices	67.52
2. Probate fees	26.00
3. Admr. bond premium	105.55
4. Attorney's fees	20,750.00
5. Wyoming Inheritance tax	16,870.00
Total addition to income	37,819.07

Nos. 1, 2 and 3 are expenses in connection with the administration of the estate and are unallowable deductions from income under Art. 293 of Reg. 45.

The report continues:

"No. 4. Attorney's Fees

Mr. Corthell was asked if the attorney's fees were for services in connection with the administration of the estate or for services in the management of the property of the estate and his reply was that they were all in payment for services in connection with the administration of the estate. His attention was then called to Art. 293 wherein such expenses are not allowable deductions from income and also to Solicitor's Opinion 88 contained in Cumulative Bulletin #4 on page 119 wherein such expenses are discussed more fully. In the Solicitor's Opinion, a distinction is made between attorney's fees for services in connection with the administration of the estate and for services in connection with the operation of the business.

In this case, Mr. Corthell being both administrator for the estate and a member of the partnership of Corthell, McCollough and Corthell, who were the attorneys for the estate, not only attended to the affairs of administration but also collected the royalties and invested the proceeds until the estate was closed. He gave as his reason for deducting the amount from income on the original return, that he considered it an expense incident to the production of the income and a proper deduction therefrom. He also stated that attorney's fees had been disallowed by the Federal Estate Examiners in determining the value of the es-

tate subject to federal estate tax, for the reason that they had not been paid and the amount was indeterminable. He [fol. 14] stated, therefore, that inasmuch as they had not been considered for estate tax purposes, he considered it proper to deduct them from income for income tax purposes.

While it is true some services were rendered in the collection and investment of the income, it seems the major portion of the fees were in payment for services in connection with the administration of the estate. No information was available to show the proportionate amount applying to services rendered in connection with the management of the business of the estate.

Mr. Corthell intimated that he would contest the disallowance of this item and an attempt has been made to state the circumstances in detail as nearly as they could be determined for the information of the Department in future consideration of the matter.

Item 5

Wyoming Inheritance Tax in the amount of $16,870.00 deducted on the original return but disallowed under authority of IT 1474 contained in Bimonthly Digest No. 6 on page 58.

Depletion was computed in the same manner as in 1919 with the exception that the amended value of the oil rights as determined by the Federal Estate Examiners was used as the cost basis. As stated in letter accompanying report, this item is left undisturbed subject to the findings of the Department on the claim for depletion made by the Ohio Oil Company on the same property.

Expenses of Trustees

The trustees of the property lived in England and it was necessary for them to make two trips over here in connection with the management and operation of the property. Their expenses were paid in the amount of $3,730.02 which appeared to be a proper business expense.

Schedule 4. Computation of Tax. Dec. 31, 1920

Amended net income, Schedule 3		98,989.91
Less:		
Exemption	1,000	
Taxable int. on U. S. obligations	257.43	
		1,257.43
Income subject to normal tax		97,732.48
[fol. 15] Normal tax at 4% on	4,000.00	160.00
Normal tax at 8% on	93,732.48	7,498.60
Surtax on total net income	98,989.91	23,025.16
Total tax liability		30,683.76
Tax previously assessed		13,082.61
Additional tax due		17,601.15"

Exhibit No. 2 is a protest which is as follows:

EXHIBIT No. 2, PAGE 1

IT:PA:4. GWF:406.

Aug. 27, 1925.

The Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Referring to your letter of August 5, 1915, relative to audit of Income Tax Return Estate of A. F. T. Cooper, deceased, for the taxable year 1920, indicating a deficiency tax amounting to $17,601.15, I submit herewith a request for a hearing with respect to the items stated below. Following are the particulars called for in your letter:

A. Estate of A. F. T. Cooper, N. E. Corthell, former Administrator, Laramie, Wyo.

C. B. Collison, E. P. Lewis, R. F. Cooper, Trustees, % N. E. Corthell, Laramie, Wyo.

C. Notice of Aug. 5, 1925. IT:PA:4, GWF:406.

D. The tax in dispute amounts to $17,601.15 covering the taxable year of 1920.

E. Exception is taken to the following items disallowed under Schedule 3-A of the Report of Mar. 19, 1923.

4. Attorney's fees	$20,750.00
5. Wyoming Inheritance Tax	16.870.00

F. 1. With respect to item 4, Attorney's fees, $20,750.00, [fol. 16] the statement in the report of the Investigator that "Mr. Corthell was asked if the attorney's fees were for services in connection with the administration of the Estate, or for services in the management of the property of the estate, and his reply was that they were all in payment for services in connection with the administr-tion of the Estate," is not true in fact. The payment in question was made as the result of an agreement between the Trustees and the attorneys covering a considerable variety of services rendered from the date of the death of A. F. T. Cooper in 1918 to the end of the year 1920. These services included advice from time to time concerning the operations of the lessee of the oil properties, negotiations and contracts for other oil leases, investigations and opinions concerning righ-s of inheritance under Statutes and treaties, and other special and particular services besides the general care and oversight of the interest of the Trustees and the beneficiaries in the estate. No occasion arose to apportion the payments between Probate expenses and other expenses connected with the Estate, and no attempt was made to do so. The taxpayers would willingly avail themselves of any opportunity to adjust and settle such apportionment for the purposes of the assessment.

2. The statement in the report of the investigator that "He (Mr. Corthell) also stated that attorney's fees had been disallowed by the Federal Estate Examiners in determining the value of the estate, subject to Federal estate tax," etc., is not true in fact. In submitting the report for the determination of the Estate tax, claim was made for the statutory commissions allowable to an administrator, but not for any of the attorney's fees involved in the payment above referred to, except an item of $750.00, which was disallowed. The claim for deduction of administrator's commissions was disallowed for the reason that the estate had not then been finally settled, nor any fees or commissions allowed or paid. In fact no commissions

were allowed or paid in the probate of the estate, but these services were taken into consideration in the final settlement of the Attorney's fees covered by the above payment.

3. The deduction of Wyoming Inheritance Tax $16,870 involves no disputed question of fact, as we understand it, but is purely a question of law. Reference is made for further amplifications of the grounds of these exceptions to [fol. 17] letter of the undersigned, addressed to the Commissioner of Internal Revenue, under date of Apr. 5, 1923, with respect to the assessment above referred to.

—— ——, Former Administrator A. F. T. Cooper Estate and Attorney for the Trustees Now Having Possession of the Estate.

STATE OF WYOMING,
County of Albany, ss:

I, N. E. Corthell, being first duly sworn say-: I have read the foregoing statements and, in so far as the same relate to matters of fact, the same are true to the best of my knowledge and belief.

—— ——.

Subscribed in my presence and sworn to before me this — day of August, 1925. —— ——, Notary Public.

EXHIBIT 3

Exhibit No. 3 is a form letter of the Commissioner, dated November 24th, 1925, addressed to Estate of A. F. T. Cooper, containing the following paragraph:

"The determination of the income tax liability of the Estate of A. F. T. Cooper for the taxable year 1920 as set forth in office letter dated August 5, 1925, has been changed to disclose a deficiency in tax amounting to $7,297.16. The adjustments made are explained in detail in the attached statement."

Following is an outline of the prescribed procedure for appeal, attached to which is the following statement:

"Statement

IT:PA:4-60D. GWF:406

In re Estate of A. F. T. Cooper, Laramie, Wyoming

Year, 1920; Deficiency in tax, $7,297.16

Reference is made to office letter dated August 5, 1925, in which you were advised of a deficiency in tax for the year 1920 amounting to $17,601.15.

[fol. 18] You are advised that your protest relative to the adjustments made has been considered and the return for the year 1920 has been reaudited.

The deduction of $20,750.00, the greater portion of which represents a business expense of the estate, has been allowed. This adjustment reduces net income of $98,989.91 to $78,239.91 on which the correct tax liability is $20,139.77 and the additional tax liability $7,057.16.

Relative to your contentions that the estate should be allowed a deduction of $16,870[illegible]0 representing Wyoming Inheritance Tax, you are advised that under IT 1474 the inheritance taxes imposed by the State of Wyoming, are imposed upon the right of the beneficiary to receive property of a decedent and are deductible by the beneficiaries only.

Your protest relative to this contention is, accordingly, denied and the amount of tax paid is being allowed as a deduction to the beneficiaries of the estate.

You are advised that since the taxpayer appears to have been a nonresident alien of Great Britain and Ireland at the time of his death, the exemption of $1,000.00 allowed by the Revenue Agent has been disallowed in accordance with the provisions of Section 216 (e) of the Revenue Act of 1918.

"In the case of a nonresident alien individual who is a citizen or subject of a country which imposes an income tax the credits allowed in Subdivisions C and D shall be allowed only if such country allows a similar credit to citizens of the United States not residing in such country."

Great Britain and Ireland in imposing its income tax fails entirely to satisfy the similar credit requirements of the statute.

You are also advised that in the case of a nonresident alien the normal tax for 1920 is 8%.

The net income and tax liability is determined as follows:

[fol. 19] Net income reported	$61,170.84
Items disallowed:	
Pub. notices	67.52
Probate fees	26.00
Adm'r's Bond Premium	105.55
Wyoming inheritance tax	16,870.00
Net income adjusted	$78,239.91
Less Dividends	257.43
Net income subject to normal tax	$77,982.48
Normal tax at 8%	$6,238.60
Surtax	14,141.17
Total tax liability	$20,379.77
Tax previously assessed	13,082.61
Additional tax liability	$7,297.16

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him."

EXHIBIT 4

Exhibit No. 4 is a letter from N. E. Corthell to M. S. Reynolds, Collector, which reads as follows:

"Mar. 20, 1926.

M. S. Reynolds, Esq., Collector Internal Revenue, Cheyenne, Wyo.

DEAR MR. REYNOLDS: I enclose herewith check to C. B. Collinson, et al., Trustees A. F. T. Cooper Estate for $7,297.16, paying under protest Deficiency Income Tax determined and assessed for 1920, under the name of Cooper,

A. F. T., Estate, N. E. Corthell, Administrator. As I understand this Deficiency is based chiefly on the following grounds:

1. Disallowance of claim of $1,000 personal exemption.

[fol. 20] 2. Disallowance of claim to be assessed on first $4,000 at 4% instead of 8%.

3. Disallowance of deductions claimed for publishing Notices, Probate fees and Administrator's bond premium in connection with the estate.

4. Disallowance of deduction claimed for payment of Wyoming Inheritance Tax $16,870.00.

Each of the foregoing disallowances is conceived to be without authority of law.

Please issue receipt in the name of C. B. Collinson, E. P. Lewis, R. F. Cooper, Trustees A. F. T. Cooper Estate.

Yours truly, —— ——.

NEC—r.
Enc."

EXHIBIT No. 5

Exhibit No. 5 is a letter of N. E. Corthell to M. S. Reynolds, Collector, reading as follows:

1773. "July 27, 1926.

Mr. M. S. Reynolds, Collector Internal Revenue, Cheyenne, Wyo.

DEAR MR. REYNOLDS: I enclose herewith Claim for Refund of Taxes Form 843, A. F. T. Cooper Estate, N. E. Corthell, Administrator, relating to the Deficiency Income Tax of said Estate for the period from Jan. 1st to Dec. 12, 1920.

I also enclose copy of Brief in support of the claim.

Yours truly, —— ——.

NEC—r.
Enc. 2."

[fol. 21] EXHIBIT No. 6

Exhibit No. 6 is an application for refund, of which the following is a copy:

Claim for Refund of Taxes Illegally Collected

STATE OF WYOMING,
County of Albany, ss:

Cooper, A. F. T., Estate; N. E. Corthell, Administrator (Taxpayer); Laramie, Wyoming (Residence).

Same; payment made by C. B. Collinson, E. P. Lewis, R. F. Cooper, Trustees; (Business address:) ——.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period: Year from Jan. 1, 1920, to Dec. 12, 1920

1. Business in which engaged: None.
2. Character of assessment or tax: Deficiency income tax.
3. Amount of assessment or stamps purchased $0
4. Reduction of tax liability requested (inc. & profits tax) 0
5. Amount to be abated 0
6. Amount to be refunded (or such greater amount as is legally refundable) 7,297.16
7. Date of payment (see Collector's receipts or indorsements of canceled checks): March 21, 1926.
8. District in which return (if any) was filed: Cheyenne, Wyoming.
9. District in which unpaid assessment appears: ——
10. Amount of overpayment claimed as credit ....
11. Unpaid assessment against which credit is asked; period from —— to —— 0

Deductions claimed were erroneously disallowed, as follows:

[fol. 22] Publishing notices incident to final settlement $67.52
Probate fees (on Final settlement) 26.00
Adm'r's Bond premium (Aug. 4 to Dec. 12, 1920) 105.55
Wyoming Inheritance tax 16,870.00

$17,069.07

Claim of personal exemption of $1,000.00 was erroneously disallowed.

Normal tax was erroneously computed on first $4,000 @ 8% instead of 4$, estate being treated as non-resident.

The deficiency income tax of $7,297.16 was erroneously assessed upon the foregoing basis.

(Signed) N. E. Corthell, Former Admr., Laramie, Wyo.

Sworn to and subscribed before me this — day of ——, 19—. —— ——."

Exhibit No. 7 is a brief accompanying the application for refund, and supporting the same, amplifying the grounds of the application and discussing the points of law supposed to be involved.

EXHIBIT No. 8, PAGE 1

Exhibit No. 8 is a letter from the commissioner, reading as follows:

"IT:C:PrA. ELA.

Washington, May 18, 1929.

Mr. M. E. Cothell, Administrator of the Estate of A. F. T. Cooper, Laramie, Wyoming.

SIR: Reference is made to the recent conference held in this office in regard to the income tax liability of the Estate of A. F. T. Cooper for the year 1920.

[fol. 23] You are advised that inheritance taxes paid to the State of Wyoming in the amount of $16,870.00 has been allowed as a deduction for the year 1920 in accordance with the provisions of Section 703.

You are informed, however, that administrative expenses of $20,750.00 are not allowable deductions from the income of the estate, these deductions being allowable only against the corpus of the estate. Action of the Commissioner in disallowing administrative expenses has been upheld by the United States Board of Tax Appeals in the decision in

the case of the Estate of James W. Cannon, Sr., Docket Number 1842. The correct computation of the tax follows:

Net income, revenue agent's report		$98,989.91
Less Inheritance taxes paid to the State of Wyoming		16,870.00
Amount subject to surtax		$82,119.91
Less:		
Liberty bond interest	$257.43	
Personal exemption	1,000.00	
		1,257.43
Amount subject to normal tax		$80,862.48
Amount subject to normal tax at 4%		4,000.00
Amount subject to normal tax at 8%		76,862.48
Normal tax at 4%		160.00
Normal tax at 8%		6,149.00
Surtax		15,637.96
Total tax		$21,946.96
Tax assessed on return	$13,082.01	
Additional assessment	7,297.16	
Total tax assessed		20,379.77
Addition		$1,567.19

Since the correct computation results in an additional tax as indicated above which is barred from assessment by the [fol. 24] Statute of Limitations your claim will be rejected on the next schedule to be approved by the Commissioner.

Respectfully, C. B. Allen, Deputy Commissioner, by Charles P. Suman, Head of Division."

Exhibit 9

Exhibit No. 9 is a letter from the commissioner, reading as follows:

"IT:C:PrA. OMS.

Washington, Sep. 4, 1929.

Mr. N. E. Corthell, Administrator Estate of A. F. T. Cooper, Laramie, Wyoming.

SIR: Further reference is made to a letter from Mr. A. W. McCollough, dated July 18, 1929, to a conference held in this office May 8, 1929, and to office letter dated May 18, 1929, relative to a claim for refund of $7,297.16, filed for the year 1920.

The claim is based on the contention that the estate was erroneously treated as a nonresident alien and that deductions as following were erroneously disallowed:

Publishing notices (Incident to final settlement)	$67.52
Probate fees (on final settlement)	26.00
Administration bond premium (August 4 to December 12, 1920)	105.55
Wyoming inheritance taxes	16,870.00
Total	$17,069.07

The Wyoming inheritance taxes of $16,870.00 have been allowed as a deduction and the tax has been computed under the provisions of Sections 210 and 211 applicable to a resident. See office letter dated May 16, 1929. The claim was rejected, however, for the reason that a reexamination of the case indicates a tax liability in excess of the amount assessed.

[fol. 25] You are advised that in determining whether there has been an overpayment of taxes for any year, it is necessary to consider all items on the return, whether or not these items are mentioned in the claim for refund. The deduction of $20,750.00, listed on the return as attorney's fees, appears to represent a capital item chargeable against the corpus of the estate. The item is explained in your protest dated August 27, 1925, as payments made as a result of an agreement between the trustees and attorneys covering a considerable variety of services rendered from the date of death of A. F. T. Cooper in 1918 to the end of the year 1920. You also state that no occasion arose to apportion the payments between probate expenses and other ex-

penses connected with the estate and that no attempt was made to do so.

Inasmuch as there is no evidence on file as to the portion of the $20,750.00 which represents charges for services incident to the operation of the business of the estate and as to the amount representing administration expenses, this office is unable to determine whether any part of the item is allowable as a deduction from income. The entire amount has, therefore, been disallowed.

A reaudit of the return indicates a net income as follows:

Net income reported on return		$61,170.84
Plus unallowable deductions:		
Publishing notices	$67.52	
Probate fees	26.00	
Administration bond premium	105.55	
Attorney's fees	20,750.00	
		20,949.07
Net income adjusted		$82,119.91

The total tax on $82,119.91, after deducting personal exemption credit of $1,000.00 plus $257.43 Liberty Bond interest and computing normal tax at 4% on the first $4,000.00 of net income, is $21,946.96. Since a tax of only $20,379.77 has been paid, it appears that there has been no overpayment of tax for the year 1920. The action of this office in rejecting your claim for refund appears to be correct.

Relative to the refund payments made to the heirs of the estate of A. F. T. Cooper, you are advised that the individual returns were adjusted on the basis of the allowance of [fol. 26] the Wyoming inheritance taxes of $16,870.00 to the beneficiaries. The amounts of overassessments were either refunded or credited against outstanding taxes for other years in May or June of the year 1926.

Respectfully, David Burnet, Deputy Commissioner,
by Charles P. Samson, Head of Division."

EXHIBIT No. 10, PAGE 1

Exhibit No. 10 is a copy of the original return of the taxpayer, which is as follows:

Individual Income-tax Return for Period Begun Jan. 1, 1920, and Ended Dec. 12, 1920

N. E. Corthell, Admr. A. F. T. Cooper Estate, Laramie, Wyoming

1. Are you a citizen of the United States? Yes.

* * * * * * *

4. Did you file a return for 1919? Yes.

5. If so, what address did you give on that return? As above.

6. To what Collector's office was it sent? Wyo.

7. Did you receive any adjustments during the taxable period on account of Government contracts through the operations of a claims board or otherwise? No.

* * * * * * *

12. Write "R" if you kept no books, or books on a cash basis; or "A" if you kept books on an accrual basis. A.

13. Did you pay during the calendar year 1920 to any individual rent, wages, salaries, or other fixed or determinable income amounting to $1,000.00 or over? Yes.

* * * * * * *

16. Enter on line (a) in the table below Interest on Liberty Bonds and other obligations of the United States issued since September 1, 1917, and War Finance Corpo- [fol. 27] ration Bonds, received by you during the taxable period, including interest received through partnerships, personal service corporations, and fiduciaries.

4¼%. Other Obligations issued since September 1, 1917.

* * * * * * *

Treas. Cert's

(c) Exemptions $20,000.00

* * * * * * *

(j) Principal in excess of exemptions	15,000.00
(k) Taxable interest	257.43
(l) Total taxation interest on all obligations as computed above on line (k)	$257.43

Computation of Tax

17.	Net income on which tax is to be computed		$61,170.84
19.	Less:		
	Taxable interest on Liberty Bonds, etc.	$257.43	
20.	Personal exemption	1,000.00	
21.	(Total)		1,257.43
22.	Balance subject to normal tax	$59,913.41	
23.	Amount subject to normal tax at 4%	4,000.00	
24.	Balance subject to normal tax at 8%	$55,913.41	
25.	Normal tax at 4% on amount of Item 23		$160.00
26.	Normal tax at 8% on amount of Item 24		4,473.07
27.	Surtax on Item 17		8,449.54
28.	Total Tax		$13,082.61

[fol. 28]

Schedule E

Income from Rents and Royalties

1. Kind of Property: Oil & Gas.	
2. Name and address of Tenant, Lessee, etc.: Ohio Oil Co., Findlay, Ohio.	
3. Amt. Rec'd	$293,282.61
4. Repairs, Wear and Tear, Obsolescence, Depletion & property losses	81,710.53
6. Taxes	126,458.79
7. Other Expenses	25,553.09

Net Income from Rents & Royalties (total of column 3 minus total of columns 4, 6 & 7) . . . 59,560.20

* * * * * * *

Schedule G

Other Income (not Including Dividends or Interest on Obligations of the U. S.)

* * * * * * *

3. Interest on bank deposits, mortgages, etc. . . . 1,353.21

* * * * * * *

Schedule I

Taxable Interest on Liberty Bonds, Other Obligations of the U. S., and War Finance corporation bonds 257.43

Schedule J

Total net income from above sources $61,170.84

* * * * * * *

Schedule N

Net Income upon which tax is to be computed . $61,170.84

1. Refer to "A", "E", or "K". E 4.
2. Kind of property: Oil & Gas.
3. Date acquired: 1918.
5. Cost, or if acquired prior to Mar. 1, 1913, the fair market value on that date: $1,200,800.00.
6. Repairs, ordinary & incidental: $——.
7. Rate: .101 145 per bbl.
8. Amt. previous years: $12,611.93.
9. Amt. this year: $81,710.53.

[fol. 29] Explanation of Deductions

E7. Att'y's ffes, $20,750. Expenses of Trustees, $3,730.02. Tools, $119. Geological investigations, $750. Publishing notices, $67.52. Probate fees, $26.00. Clerical service, $5.00. Administrator's bond premium, $105.55.

And the foregoing was all of the evidence given or offered on the trial of said cause.

MOTION FOR STATEMENT OF CONCLUSION OF LAW

Thereafter, and before entry of the judgment in said cause, the plaintiffs filed and presented to the court a motion for statement of conclusion of law entitled in said cause, and expressed in the words and figures following, to-wit:

"The plaintiffs move the court to state and declare as a conclusion of law upon the admissions, the evidence and the facts found in the above-entitled cause, as follows:

"The action of the Commissioner of Internal Revenue on May 18, 1929, in revising and redetermining the income tax, assessment and liability of the Estate of A. F. T. Cooper, deceased, for the year 1920, and his action on September 4, 1929, in reaffirming such determination, were, in each instance, void and beyond the jurisdiction and power of the said Commissioner, being had and taken after the period for the assessment of such income tax liability had expired."

And upon due consideration of the said motion, the court thereafter, on the 29th day of August, 1930, denied the same, to which ruling of the court the plaintiffs excepted.

Thereupon the court made and filed its findings of fact and conclusions of law in said cause, in the words and figures following, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly to be tried before the Court without a jury, due waiver of a jury in writing having been filed herein, and the parties appearing by their respective [fol. 30] counsel, and the Court having heard and considered the evidence and argument of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. That Arthur Francis Thomas Cooper died on or about December 8, 1918, and N. E. Corthell was appointed and duly qualified and acted as administrator of the estate of the decedent. That on or about February 8, 1921, the said

administrator on behalf of said estate filed with the Commissioner of Internal Revenue a federal income tax return for the said estate for the taxable period starting January 1st, and ending December 12, 1920. That final settlement of the said estate was made on December 12, 1920, and at that time the said estate was distributed to the trustees under the Will of the said decedent and the administrator discharged and the estate closed.

II. That the trustees under the Will of Arthur Francis Thomas Cooper, deceased, to whom such distribution was made, were Christopher Barbour Collinson, Edgar Percy Lewis; and Richard F. Cooper, the plaintiffs herein.

III. That Marshall S. Reynolds is the United States Collector of Internal Revenue for the District of Wyoming and the tax here in controversy was paid to him as such official.

IV. That the income tax return for the said estate filed as hereinabove set out showed a tax liability of $13,082.61, which sum was paid. In determining this tax, deductions from gross income of the estate for attorney's fees, in the sum of $20,750.00 and for Wyoming inheritance tax in the sum of $16,870.00, which sums had been paid by the administrator, were claimed.

V. In March, 1923, an Internal Revenue Agent, after an investigation of the said estate, recommended the disallowance of both of these claimed deductions. In August, 1925, the commissioner notified the taxpayer of the deficiency in tax amounting to $17,601.15, based upon the report of the said Revenue Agent, following which the taxpayer filed a protest. Upon consideration of the matter as presented by the protest, and in November, 1925, the said Commissioner [fol. 31] made a redetermination of the tax and found that the greater portion of the deduction of $20,750.00 represented a business expense of the estate, and allowed that sum as a deduction, but adhered to his disallowance for the Wyoming State Inheritance Tax in the sum of $16,870.00, holding that such payment, although made by the administrator, was deductible only by the beneficiaries of the estate, and determined the additional tax liability on this basis to be $7,297.16, which amount was paid by the plaintiffs on March 20, 1926. On July 29, 1926, the taxpayer filed a claim for refund of such additional tax.

VI. On May 18, 1929, the Commissioner of Internal Revenue rejected the claim for refund filed on July 29, 1926, as above set out, and so notified the representatives of the estate, and at the same time further advised the administrator of the estate that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduction from gross income for the year 1920 in accordance with Section 703 of the Revenue Act of 1928, that the personal exemption of $1,000.00 was allowed and that the normal tax on the first $4,000.00 of taxable income was computed at 4% instead of at 8%; that the attorney's fees in the sum of $20,750.00 which had been claimed as a deduction in the return was disallowed, that the correct computation of the tax resulting from the foregoing adjustments resulted in an increase in the additional tax, that is, in excess of the sum of $7,297.16, in the amount of $1,567.19, but that the collection of this excess was barred by the Statute of limitations and no attempt to collect it was made.

VII. Thereafter this suit was filed by the trustees. The other small items included in the protest of payment were waived upon the trial and the matter was presented to the court solely upon the action of the Commissioner as it affects and concerns the claimed deductions for attorney's fees and Wyoming inheritance tax.

Conclusions of Law

I. The income tax collected by the defendant from the estate of Arthur Francis Thomas Cooper, deceased, for the year 1920 is correct and in accordance with law.

II. The defendant is entitled to judgment for his costs and disbursements herein.

[fol. 32] To each of which Conclusions of Law the plaintiffs except.

T. Blake Kennedy, Judge."

IN UNITED STATES DISTRICT COURT

APPROVAL OF BILL OF EXCEPTIONS

And, thereafter, to-wit, on the 29th day of August, 1930, the plaintiffs duly tendered and submitted to the court this,

their Bill of Exceptions in said cause, which having been examined by the court, and it being found that the exceptions are herein truly agreed, the said Bill of Exceptions is now here allowed as a part of the record in said cause.

Dated August 29th, 1930.

T. Blake Kennedy, Judge."

IN UNITED STATES DISTRICT COURT

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated on the part of the plaintiffs and the defendant in the above cause that the foregoing Bill of Exceptions is a full, true and correct statement of the proceedings in the trial and disposition of said cause, and the exceptions of the plaintiffs had and taken in such proceedings.

Dated August 29th, 1930.

N. E. Corthell, Attorney for Plaintiffs. Albert D. Walton, United States Attorney for District of Wyoming; John R. Wheeler, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Aug. 29, 1930

To Hon. T. Blake Kennedy, judge of said court:

The above-named plaintiffs feeling themselves aggrieved by the order and judgment made and entered in this cause on the — day of August, 1930, do hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Tenth Circuit for the reasons specified in the as- [fol. 33] signment of errors filed herewith, and pray that their said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which such order and judgment are based, duly authenticated, may be sent to the United

States Circuit Court of Appeals for the Tenth Circuit sitting at Denver, Colorado; and that such further order may be made as to the bond on appeal, to be filed and approved in order to perfect said appeal, as shall to the court seem proper.

Dated this 29 day of Aug., 1930.

N. E. Corthell, Attorney for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Aug. 29, 1930

Upon reading and filing the petition for appeal on the part of the plaintiffs above named, and an assignment of errors having been presented and filed:

It is ordered that the appeal be allowed in the above-named cause to the Circuit Court of Appeals for the Tenth Circuit, and that the bond to be filed therewith is fixed in the sum of Five Hundred Dollars.

Dated this 29 day of Aug., A. D. 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 29, 1930

Come Now Edgar Percy Lewis and Richard F. Cooper, plaintiffs above-named, and appellants in the above-entitled cause, and in connection with their petition for appeal in this cause, assign the following errors which the said appellants aver occurred at the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

1. The court erred in denying the motion of the plaintiffs to state and declare as a conclusion of law upon the admissions, the evidence and the facts found, as follows:

[fol. 34] "The action of the Commissioner of Internal Revenue on May 18, 1929, in revising and redetermining the income tax, assessment and liability of the Estate of A. F. T. Cooper, deceased, for the year 1920, and his action on September 4, 1929, in reaffirming such determination, were, in each instance, void and beyond the jurisdiction and power of the said Commissioner, being had and taken after the period for the assessment of such income tax liability had expired."

The admissions, the undisputed evidence and the findings of the court were in effect that the taxpayer's return was filed February 8, 1921, and the indicated tax duly paid; that on November 24, 1925, the Commissioner determined and assessed the deficiency tax, which was duly paid and is here sought to be recovered; that application for refund thereof was duly filed, and that in rejecting such application the Commissioner, on May 18, 1929, attempted to revise and change his previous findings of fact and to redetermine the tax. Without such change and redetermination the application for refund was conceded by the Commissioner to be well founded for substantially the whole amount sought to be recovered. It was the contention of the plaintiffs that such revision and change of assessment, attempted more than five years after the return was filed, was void.

2. The Court erred in its first conclusion of law in holding that the income tax collected by the defendant for the year 1920 is correct and in accordance with law. This assignment is based upon substantially the same grounds as are set forth in assignment No. 1.

3. The Court erred in its second conclusion of law that the defendant is entitled to judgment for his costs and disbursements herein. This assignment, also, is based upon substantially the same grounds as are set forth in assignment No. 1. It was the contention of the plaintiffs that they were entitled to judgment against the defendant for the recovery of so much of the deficiency tax of Seventy-two

Hundred Ninety-seven and 16/100 ($7297.16) Dollars, as was based upon the disallowance of the claimed deduction of Sixteen Thousand and Eight Hundred Seventy ($16,870.00) Dollars, Wyoming State Inheritance Tax paid, the disallowance of the personal exemption of One Thousand ($1,000.00) Dollars claimed and the computation of the [fol. 35] normal tax on the first Four Thousand ($4,000.00) Dollars of taxable income at four (4%) per cent instead of at eight (8%) per cent.

4. The Court erred in giving judgment for the defendant and against the plaintiffs. It was the contention of the plaintiffs that they were entitled to a judgment against the defendant for the recovery of the sum indicated in assignment No. 3 above, together with interest thereon from March 20th, 1926, at the rate of six (6%) per cent per annum, and the cost of the action.

Wherefore the appellants pray that the judgment of the said District Court may be reversed, and that the appellants recover from the defendant, as set forth in this assignment of errors.

N. E. Corthell, Attorney for Appellants.

[File endorsement omitted.]

(Citation in proper form, directed to appellee, was issued on Aug. 29, 1930, and on the same day service of said citation was accepted by counsel for said appellee.)

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING TRANSCRIPT—Filed Sept. 25, 1930

Come now the above named plaintiffs and appellants and hereby elect to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit.

Dated this 25th day of September, A. D. 1930.

N. E. Corthell, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION FOR TRANSCRIPT—Filed Sept. 25, 1930

It is hereby stipulated and agreed between the parties in the above-entitled cause that the following portions of the record shall be included in the transcript, to-wit:

[fol. 36] 1. The plaintiffs' petition.
2. The defendant's answer. (Filed Feb. 5, 1930.)
3. The order suggesting death of Christopher Barbour Collinson.
4. The order denying motion for statement and declaration of conclusion of law.
5. Findings of Fact and Conclusions of Law and Judgment.
6. The Judge's memorandum.
7. The Bill of Exceptions.
8. The petition for appeal.
9. The order allowing appeal.
10. The assignment of errors.
11. The citation on appeal.
12. Election as to printing.
13. This stipulation.
14. Bond on Appeal.

N. E. Corthell, Attorneys for Plaintiffs. Albert D. Walton, United States Attorney for the District of Wyoming; John R. Wheeler, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

[File endorsement omitted.]

(Bond on appeal in the sum of $500, approved by the District Judge, with appellants as principals and C. D. Spalding and R. G. Fitch as sureties, was filed in the District Court on Aug. 29, 1930.)

[fol. 37] IN UNITED STATES DISTRICT COURT

Corthell, McCullough and Corthell, of Laramie, Wyo., for Plaintiff.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., C. M. Charest, General Counsel, and John R. Wheeler and P.

E. Miller, Special Attorneys of Internal Revenue Bureau, of Washington, D. C., for Defendant.

JUDGE'S MEMORANDUM—Decided July 23, 1930

KENNEDY, District Judge:

This is an action at law in which plaintiffs seek to recover of the defendant Collector, a certain sum paid as income taxes under protest, upon the ground that said taxes were improperly and illegally assessed. The Collector resists the suit by appropriate pleadings and the matter is presented to the court, a trial by jury having been expressly waived.

Arthur Francis Thomas Cooper having died, the administrator of the estate made an income tax return for the year 1920 in which deductions of two items were claimed, (1) attorney's fees expended of $20,750.00 and (2) Wyoming inheritance tax paid of $16,870.00, from which computation there resulted a tax of $13,082.61, which was subsequently paid in March, 1921. In March, 1923, a Revenue agent recommended the disallowance of both claimed deductions. In August, 1925, the Commissioner of Internal Revenue notified the taxpayer of a deficiency in tax amounting to $17,000.00 plus, based upon the report of the agent, following which the taxpayer filed a protest. In November, 1925 the Commissioner made a re-determination of the tax by which item No. one hereinbefore referred to relating to attorney's fees was allowed as a deduction, and item No. two relating to the Wyoming inheritance tax was disallowed and the tax thereupon recomputed and assessed by which an additional tax liability of $7,297.16 was levied. In March, 1926 the taxpayer transmitted and paid under protest such additional tax. In July, 1926, the taxpayer filed application for a refund of such additional tax. In May, 1929, the Commissioner notified the taxpayer of his decision resulting in a refusal to refund and setting forth a recomputation of the tax. In his latest computation the Commissioner allowed the deduction of item No. two, the [fol. 38] Wyoming inheritance tax paid, but disallowed item No. one, the attorney's fees expended which had theretofore been allowed, resulting in an indicated additional tax of $1,500.00 plus, which additional tax the Commissioner ruled was barred by the Statute of Limitations, but refusing any

refund of the taxes so paid under protest. Other small items included in the protested payment were waived upon the trial and the matter is presented to the court solely upon the action of the Commissioner as it affects and concerns the two items which are hereinbefore referred to.

It is the contention of the plaintiffs, as the court understands it, that the Commissioner once having allowed the deduction in making the assessment of the item concerning attorney's fees, is barred from subsequently disallowing said deduction because of the time which elapsed and that such action by the Commissioner in allowing such reduction became final. On the other hand, the defendant contends that so long as the matter of the adjustment of the tax was before the Commissioner, that official had the right and the authority to modify and change the assessment schedules so long as the matter of the particular tax for which the application for refund had been made was before him and remained unadjusted.

The courts have not been entirely in harmony upon the exact point here presented. Without entering into a lengthy discussion of these decisions, the latest case cited by counsel for defendant is one from the Third Circuit, McIlhenny, et al. v. Commissioner, 39 Fed. (2d) 356, where the following set-up of facts is presented:

"John D. McIlhenny filed an income tax return for the year 1920, in which he claimed a deduction for loss of $4,749.42. Early in 1923, a revenue agent examined his return and disallowed the deduction. McIlhenny filed a protest. In February of 1924 the Commissioner of Internal Revenue, after giving consideration to the report of the revenue agent and the taxpayer's protest, expressly allowed the deduction in full. Other adjustments in the return, however, resulted in a determination of a deficiency and an assessment of an additional tax which McIlhenny duly paid in full. On November 18, 1925, the same Commissioner, without having before him any evidence of fraud, mal- [fol. 39] feasance, misrepresentation of fact, or new evidence of any character, reopened the case, disallowed the deduction and, on January 8, 1926, notwithstanding the protest of the executors of McIlhenny, who had died on November 23, 1925, determined, solely because of such disallowance, a deficiency in his income tax for 1920 in the sum of $2,043.82. The executors appealed from the redetermina-

tion of the Commissioner to the United States Board of Tax Appeals. The Board sustained the Commissioner."

The court then analyses the question presented in the following language:

"But the sole question presented by the record before us is not whether the first action of the Commissioner in allowing the deduction was right or wrong, but whether having once determined the matter, the tax computed upon such determination having been paid, the Commissioner had power or authority, in the absence of fraud or other new evidence, to reopen the case, disallow the deduction theretofore allowed by him, and make a redetermination of the tax. In support of their contention that the Commissioner was without power to reopen the case and make a redetermination, the petitioners, the taxpayer's executors, rely upon Woodworth v. Kales, 26 F. (2d) 178 (C. C. A. 9), and the Commissioner's order of January 20, 1923, while the Commissioner finds support for his opposite view in Botany Mills v. United States, 278 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379; L. Loewy & Son v. Commissioner of Internal Revenue, 31 F. (2d) 652 (C. C. A. 2); Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8); Austin Co. v. Commissioner of Internal Revenue, 35 F. (2d) 910 (C. C. A. 6); sections 1312 and 1313 of the Revenue Act of 1921, 42 Stat. 227; and sections 1006 and 1007 of the Revenue Act of 1924, 43 Stat. 253 (26 U. S. C. A., Pars. 1249 note, 1250)."

The court thereupon expresses its conclusion at page 358, as follows:

"In the case at bar, the statutory procedure was not followed, in that there was no agreement in writing, or otherwise, that the determination and assessment of February, 1924, should be final and conclusive. As a consequence, we [fol. 40] are constrained to hold that the determination and assessment of 1924 were not final and conclusive, and that the Commissioner was not estopped or otherwise barred, by the payment and acceptance of the tax based on such determination and assessment, for reopening the case and making the further determination subsequently made by him."

If the state of the law is as determined in that case, I see no reason why on principle it should not be applied to the case at bar. In addition, it might be said that the plaintiffs after the redetermination still had the right to contest the validity of the disallowance of the attorney's fees and to have the matter of the proper or improper disallowance of this item passed upon in the regular course. This action, however, the plaintiffs have not elected to pursue. While it is the law that where doubt arises in regard to the construction of the tax, the doubt must be resolved in favor of those upon whom the tax is sought to be laid (Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397), yet it is likewise the law that in a suit to recover alleged illegal taxes collected, the burden of proving the illegality rests upon the taxpayer (Botany Worsted Mills v. United States, 278 U. S. 282); and in the strict application of the latter principle as concerns the item of attorney's fees, the burden placed upon the taxpayer has not been discharged by plaintiff's showing in this case.

It may be admitted that the situation which has here arisen makes for a condition of confusion and uncertainty to the taxpayer which the Congress might in all fairness make plain; however, it is doubtful whether a fair construction of the statutory provisions covering income tax assessments affords any relief at the present time.

For the reasons stated, the findings and judgment will be for the defendant together with costs, and reserving to plaintiffs their proper exceptions.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] Appearances of counsel omitted in printing.

Order of submission, January 21, 1931, omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, JANUARY TERM, 1931

No. 369

Mr. N. E. Corthell (Mr. A. W. McCullough and Mr. M. E. Corthell were with him on the brief) for appellants.

John R. Wheeler, Special Attorney, Bureau of Internal Revenue (C. M. Charest, General Counsel, and P. E. Miller, Special Attorney, Bureau of Internal Revenue, and A. D. Walton, U. S. Attorney, were with him on the brief) for appellee.

Before Cotteral, Phillips, and McDermott, Circuit Judges

OPINION—March 17, 1931

PHILLIPS, Circuit Judge, delivered the opinion of the court:

This is an action at law brought by Edgar Percy Lewis and Richard F. Cooper, as trustees under the will of Arthur Francis Thomas Cooper, deceased, to recover $7,297.16 alleged to have been wrongfully collected as federal income tax assessed against the estate of Cooper for 1920.

On February 18, 1921, the administrator of such estate filed an income tax return for the period from January 1 to December 12, 1920—a final settlement of the estate having been made on the latter date. In such return, deductions were claimed on account of the following expenditures made by the administrator: Attorney's fees, $20,750; state inheritance tax, $16,870; publishing notices, $67.52; probate court fees, $26.00; and premium on administrator's bond, $105.55. A personal exemption of one thousand dollars was claimed and the normal tax on the first four thousand dollars was computed at four per cent.

On November 24, 1925, the commissioner determined the tax upon such return. He disallowed all of such deductions except the item of attorney's fees. He determined that Cooper, deceased, was a non-resident alien of Great Britain and Ireland at the time of his death and, there-

fore, disallowed the exemption of one thousand dollars and computed the tax on the first four thousand dollars at eight per cent. He assessed a deficiency tax of $7,297.16. On March 21, 1926, the trustees paid such deficiency assessment under protest.

On July 27, 1926, the trustees filed a claim for refund of $7,297.16, based on the disallowance of such deductions [fol. 45] and exemption and the computation of the normal tax at eight per cent instead of four per cent.

A letter from the commissioner to the trustees, dated May 18, 1929, stated that the payment of $20,750 for attorney's fees was not allowable as a deduction from income, and set forth a corrected computation of the tax. In such computation, the commissioner allowed the amount paid as inheritance tax as a deduction, allowed the personal exemption of one thousand dollars and computed the normal tax at four per cent. Such computation showed a total tax liability of $21,946.96, and the tax theretofore assessed and paid as $20,379.77. Such letter further stated:

"Since the correct computation results in an additional tax as indicated above which is barred from assessment by the statute of limitations your claim will be rejected on the next schedule to be approved by the commissioner."

The trial court held that the claim for refund was properly denied and entered a judgment accordingly. The trustees have appealed.

Counsel for the trustees contend that the commissioner was without authority to redetermine and reassess the tax after the statute of limitations had run against the assessment, and that he was restricted in his consideration of the claim for refund, at the time of his decision, to a determination of whether the trustees were entitled to deductions of the specific items set up in the claim for refund.

Counsel for the collector contend that the commissioner had the power, upon consideration of the claim for refund, to reconsider the entire assessment and to determine whether or not the trustees had overpaid the tax.

Section 284 (a) of the Revenue Act of 1926 (44 Stat. 66), Section 1065, Title 26, U. S. C. A., in part provides:

"(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act (Feb. 26, 1926), the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and [fol. 46] for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of each excess shall be refunded immediately to the taxpayer."

Section 322 (a) and (b) of the Revenue Act of 1928 (45 Stat. 861), Section 2322, Title 26, U. S. C. A., in part provides:

"(a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

"(b) Limitation on Allowance.—(1) Period of limitation. No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.

The action to recover on a claim for refund is in the nature of an action for money had and received, and it is

incumbent upon the claimant to show that the United States has money which belongs to him. Champ Spring Co. v. United States (C. C. A. 8), — Fed. (2d) —.

Since, in the instant case, the trustees had not overpaid the tax, the claim for refund was properly denied.

Judgment affirmed.

[fols. 47 & 48] In United States Circuit Court of Appeals

Judgment—March 19, 1931

Before Honorable Robert E. Lewis and Honorable George T. McDermott, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby affirmed, and that Marshall S. Reynolds, Individually and as Collector of Internal Revenue, appellee, have and recover of and from Edgar Percy Lewis and Richard F. Cooper, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, appellants, his costs herein.

[fols. 49-54] Petition for rehearing, covering five pages, filed April 18, 1931, omitted from this print. It was denied and nothing more by order of April 20, 1931.

[fol. 55] In United States Circuit Court of Appeals

Order Denying Rehearing—April 20, 1931

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR SUSPENSION OF MANDATE—Filed April 27, 1931

The appellants move the court to direct the clerk to suspend the issuance of a mandate to the District Court in the above entitled cause to afford an opportunity for application which the appellants propose to make to the Supreme Court for the Writ of Certiorari.

N. E. Corthell, Attorney for Appellants.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—April 27, 1931

This cause came on to be heard on the motion of appellants for a stay of mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,927. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 115. Edgar Percy Lewis and Richard F. Cooper, as trustees under the will of Arthur Francis Thomas Cooper, deceased, petitioners, vs. Marshall S. Reynolds, individually and as Collector of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 27, 1931. File No. 35,927.